

FILED

DISTRICT COURT OF GUAM

MAR 16 2006 *98*

MARY L.M. MORAN
CLERK OF COURT

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

JAE JUNE PAK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Criminal Case No. 00-00150

Civil Case No. 04-00023

ORDER

Petitioner Jae June Pak ("Pak") filed a Motion to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255 ("Motion").¹ The court deems the matter appropriate for decision without oral argument. FED.R. CIV. P. 78. After considering all the submissions, the court DENIES Pak's motion in its entirety.

BACKGROUND

On January 8, 2001, Pak pled guilty to one count of Conspiracy to Import over 50 grams of Methamphetamine, in violation of 21 U.S.C. §§ 952(a), 960 and 963. At the time of his plea, Pak stipulated to facts contained in his plea agreement that he participated in a conspiracy with others to import over 50 grams of crystal methamphetamine a/k/a 'ice' from the Philippines into Guam for purposes of distribution and profit.² On August 13, 2003, the court sentenced Pak to one hundred thirty-two (132) months imprisonment. The judgment of conviction was entered

¹ Pak initially filed this matter as a civil rights action on April 27, 2004. The court stayed the action pending the exhaustion of Pak's *habeas corpus* remedies and the conclusion of his direct appeal. After receiving a judgement from the United States Court of Appeals for the Ninth Circuit, the court gave Pak an opportunity to file a *habeas* petition or have his existing complaint construed as a *habeas* petition. Pak failed to respond. The court then recharacterized Pak's complaint as a motion for post conviction relief pursuant to 28 U.S.C. § 2255, and gave Pak an opportunity to consolidate all prior petitions (13 had been filed). See Order Docket No. 97. On May 25, 2005 Pak filed the instant petition in response to the court's request that he consolidate all prior claims. See Docket No. 98.

² See, Plea Agreement at ¶ 8, Docket No. 12.

1 on the docket on August 14, 2003. On August 22, 2003, Pak filed an appeal with the Ninth
2 Circuit. On November 24, 2004, the appellate court affirmed Pak's conviction. *United States*
3 *v. Jae June Pak*, No. 03-10452 (9th Cir. 2004). *Pro se* and incarcerated, Pak brought this motion
4 pursuant to 28 U.S.C. § 2255, requesting the court to vacate his sentence.

5 ANALYSIS

6 28 U.S.C. § 2255 allows persons in federal custody to collaterally challenge the
7 constitutionality, legality or jurisdictional basis of the sentence imposed by a court.³ *See, United*
8 *States v. Addonizio*, 442 U.S. 178, 185, 99 S.Ct. 2235, 2240 (1979). Since such a challenge calls
9 into question a conviction's finality, collateral relief is an extraordinary remedy that should only
10 be granted when a fundamental defect could have resulted in a complete miscarriage of justice,
11 or the rudimentary rules of fair procedure were not followed. *United States v. Timmreck*, 441
12 U.S. 780, 783, 99 S. Ct. 2085, 2087 (1979).

13 *Pak* claims that he is entitled to relief for the following reasons: 1) his sentence was
14 improperly enhanced in light of *United States v. Booker*, 125 S.Ct. 738 (2005); 2) the court
15 failed to consider Pak's cooperation with the FBI in determining his sentence; 3) his plea was
16 unintelligent and involuntary because trial counsel was ineffective for failing to advise him of
17 "the parameters of the guilty plea and the [C]ourt's discretion at sentencing"; and 4) counsel on
18 appeal was ineffective because counsel failed to address the issues raised in one, two and three
19 above.

20 Applicability of *Booker*

21 *Pak* claims that his sentence was unconstitutionally enhanced in light of the recent
22 Supreme Court decision *United States v. Booker*, 125 S.Ct. 738 (2005). *Pak* asserts that the
23 sentencing guidelines used in his case were excessive and arbitrary.

24
25 ³ The statute states, in pertinent part:

26 A prisoner in custody under sentence of a court established by Act of Congress
27 claiming the right to be released upon the ground that the sentence was imposed in
28 violation of the Constitution or laws of the United States, or that the court was without
jurisdiction to impose such sentence, or that the sentence was in excess of the maximum
authorized by law, or is otherwise subject to collateral attack, may move the court
which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255.

1 The issue concerning whether Pak's sentence was unconstitutionally enhanced due to a
2 failure of the court to notify him regarding his right to a jury determination of drug quantity
3 beyond a reasonable doubt was raised on direct appeal and denied. *United States v. Jae June*
4 *Pak*, No. 03-10452 (9th Cir. November 2, 2004). The Ninth Circuit found:

5 Pak's constitutional right to have a jury determine the drug
6 quantity was not infringed, because the plea agreement recited the
7 elements of the charge against him, including drug quantity, and
8 stated that all of these elements must be proved beyond a
reasonable doubt. The elements of the charge were also discussed
during the plea colloquy, when the district court advised him that
he had the right to trial by jury.

9 *Id.*

10 It is well settled law that § 2255 may not be invoked to relitigate questions which were
11 raised on a direct appeal from the judgment of conviction. The mandate of an appellate court
12 "is controlling as to matters within its compass." *Nguyen v. United States*, 792 F.2d 1500, 1502
13 (9th Cir.1986) (quoting *Quern v. Jordan*, 440 U.S. 332, 347 n. 18, 99 S.Ct. 1139 (1979)). Such
14 a mandate forecloses the district court from reconsidering matters determined in the appellate
15 court. *Id.* at 1502. Since the Ninth Circuit mandate affirmed the court's action in this regard,
16 this court lacks the authority to reexamine the application under § 2255. *See, e.g., United States*
17 *v. Scrivner*, 189 F.3d 825, 828 (9th Cir.1999) (decision on direct appeal "is binding"); *Odom v.*
18 *United States*, 455 F.2d 159, 160 (9th Cir.1972) (when issue was decided on direct review "the
19 judgment became final" and the matter decided cannot be litigated again on a § 2255 motion).

20 Accordingly, the court finds that Pak's rights as enumerated in *Booker* were not infringed.
21 The court properly informed Pak of his right to have the drug quantity determined by a jury both
22 in his plea agreement and during the plea colloquy. Since the court finds no error occurred,
23 Pak's claim of ineffective assistance of counsel in this regard is without merit.

24 **Procedural Bar**

25 Pak did not raise the remaining claims in the District Court prior to judgment in the
26 criminal case and on direct appeal. Claims not asserted previously, although available, are
27 procedurally barred absent a showing of cause and actual prejudice. *United States v. Frady*, 456
28 U.S. 152, 166 (1982). "Where a defendant has procedurally defaulted a claim by failing to raise

1 it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate
2 either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Bousley v. United States*,
3 523 U.S. 614, 622 (1998).

4 As noted, Pak did not raise/object to the issues he asserts in the instant petition before
5 either the trial/sentencing court or appellate court. However, Pak states that he did not address
6 them previously because of ineffective counsel. *See, Murray v. Carrier*, 477 U.S. 478, 488
7 (1986) ("[i]neffective assistance . . . is cause for a procedural default"). Accordingly the court
8 will consider Pak's claims in that context.

9 **Ineffective Assistance of Counsel Claims.**

10 To demonstrate ineffective assistance of counsel, the petitioner must show both that his
11 counsel's performance was deficient and that the deficient performance prejudiced his defense.
12 *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A petitioner fulfills the first prong of the
13 *Strickland* test by showing that "the behavior complained of falls below prevailing professional
14 norms." *United States v. McMullen*, 98 F.3d 1155, 1158 (9th Cir. 1996). An inquiry into
15 counsel's conduct probes "whether counsel's assistance was reasonable considering all the
16 circumstances." *Strickland*, 466 U.S. at 688. In engaging in such an inquiry, the court "must
17 indulge a strong presumption that counsel's conduct falls within the wide range of reasonable
18 professional assistance" especially where counsel's acts may be considered "sound trial
19 strategy." *Id.* at 689. Counsel is not required to pursue all non-frivolous claims. As a matter
20 of professional judgment, competent counsel may recognize an advantage in focusing on central
21 issues rather than pursuing numerous weak ones. *Jones v. Barnes*, 463 U.S. 745 (1983).

22 *Application of U.S.S.G. § 5K1.1.* Pak contends that his sentencing/appellate counsel was
23 ineffective because the court at sentencing did not consider his cooperation with the FBI when
24 considering a reduction of the offense level based on "substantial assistance" provided by him.
25 Pak's argument is without merit. Although the government initially opposed any downward
26 departure for substantial assistance, the court held a hearing on the matter. During the hearing,
27 Agent Kim ("Kim") of the FBI testified extensively regarding Pak's cooperation. *See Sentencing*
28 *Transcript* ("Sent. TR.") 5-22, Docket No. 82. Kim recommended that Pak receive a downward

1 departure as a result. The court then continued the sentencing so that counsel could discuss the
2 matter. Ultimately the government moved for a two-level downward departure based on Pak's
3 substantial assistance.⁴ Pak through counsel asked the court for a three-level departure.⁵ The
4 court, after considering the evidence and arguments of counsel, granted Pak's request for a three
5 level downward departure, thereby reducing his offense level from 35 to 32, with a range of 121-
6 151 months. *See* Sent. TR II 10, Docket No. 83. The court imposed a sentence of 132 months.
7 The court imposed a sentence that was 78 months less than that recommended by the guidelines
8 had the court not granted the departure. Accordingly, the court finds that a departure pursuant
9 to § 5K1.1 was provided to Pak and his contention that the court failed to consider his assistance
10 is unfounded. Likewise, his claims of ineffective assistance of counsel in this regard are without
11 basis.

12 *Validity of Guilty Plea.* Pak seemingly claims that his plea was involuntary because he
13 was not fluent in the English language. Pak also contends that he was "coerced by counsel into
14 pleading guilty because that he was advised that if he plead guilty, his incarceration would "not
15 exceed seven years." Pak maintains counsel was ineffective in this regard.

16 Upon consideration of the totality of the circumstances, a guilty plea is considered valid
17 only if the defendant intelligently and voluntarily pleads guilty under the totality of the
18 circumstances. *See, Brady v. United States*, 397 U.S. 742, 749, 90 S.Ct. 1463, 1469 (1970);
19 *Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S.Ct. 1709, 1711-12 (1969). A plea may be
20 involuntary if the defendant does not understand the nature of the constitutional rights he is
21 waiving or understand what he is giving up and receiving in entering a guilty plea. *See,*
22 *Henderson v. Morgan*, 426 U.S. 637, 645 n. 13, 96 S.Ct. 2253, 2257 (1976). Additionally, a
23 guilty plea may be involuntary where induced by threats, misrepresentation, or promises "that
24 are by their nature improper." *Mabry v. Johnson*, 467 U.S. 504, 509, 104 S.Ct. 2543, 2548
25 (1984).

26
27 ⁴ The government recommended that Pak's offense level be reduced from level 35 (range of 168-210) to level 33 with
28 a sentencing range of 135-168 months. The government recommended a sentence of 135 months, the minimum of the guideline
range.

⁵ Pak's counsel recommended that Pak's offense level be reduced from 35 to 32 with a sentencing range of 121-151
months. Pak recommended the mandatory minimum sentence pursuant to statute, 121 months.

1 Rule 11 imposes a series of requirements on district courts before they may accept a
2 guilty plea. See, FED.R.CRIM.P. 11. These procedures are designed to ensure a defendant
3 pleading guilty understands his constitutional rights, the plea is being entered voluntarily with
4 a full understanding of the nature of the crime charged and the consequences of the guilty plea,
5 and a factual basis exists for the crime to which the plea is being offered.

6 In accordance with Rule 11(b)(2),⁶ the court inquired as to the voluntariness of
7 Petitioner's guilty plea at his change of plea hearing on January 8, 2001:

8 Court: Are you fully satisfied with the advice and
9 representation given to you in this case by your
lawyer, Mr. Hartsock?

10 Pak: Yes.

11 Court: Is your willingness to plead guilty the result of
discussions that you or your lawyer have had, with
12 the lawyer for the government?

13 Pak: Yes.

14 Court: Okay. There should be a copy of the plea
agreement in front of you there. Okay. Now, was
15 this document translated to you into your native
language before you signed it?

16 Pak: Yes.

17 Court: Did you have an opportunity to discuss with your
lawyer before you signed it, after it had been
18 translated to you?

19 Pak: Yes.

20 Court: Now, does the plea agreement represent all the
understandings that you and your lawyer have
21 with the Government?

22 Pak: Yes.

23 Court: Do you understand the terms of the plea
agreement?

24 Pak: Yes.

25 Court: Has anyone made other of different promises to
you or assurances of any kind in other than what's
26 in the plea agreement in order to get you to plead
guilty today?

27 Pak: No.

28 Court: Do you understand that the terms of the plea
agreement are only recommendations to the
Court?

Pak: Yes.

⁶ FED. R. CRIM. P. 11(b)(2) provides:

Before accepting a plea of guilty or *nolo contendere*, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in the plea agreement).

1 Court: Okay. And that the Court can reject the recommendations
2 Pak: Yes.
3 Court: And the Court can impose a sentence that is more
4 Pak: Yes.
5 Court: Has anyone attempted in any way to force you to
6 Pak: No.

7 See Transcript of Change of Plea Hearing ("COP TR") 6-7, Docket No. 80.

8 Pak provided these answers while under oath. Pak implies that because he is only fluent
9 in Korean his plea was somehow involuntary. However, Pak was provided with an interpreter
10 during each proceeding. At no point during his change of plea or sentencing hearings did Pak
11 indicate any difficulty understanding what was taking place. Counsel for Pak informed the court
12 that the plea agreement had been translated to Pak "at least two different times" and "spent about
13 an hour" just going through the factual basis contained in paragraph eight.⁷ Further, the court
14 also inquired of Pak as to the of the specific facts with respect to the elements of the crime
15 through the interpreter while in open court during the change of plea hearing. See, COP TR 14-
16 15.

17 Pak never brought to the court's attention that he had any difficulty understanding what
18 was taking place either at the change of plea or at his sentencing. Pak was informed of the
19 maximum sentence he faced for the count to which he pled and was informed of the possibility
20 that the court could impose an even greater sentence.⁸ Additionally, Pak indicated he had

21 ⁷ See COP TR 13-14, Docket No. 80.

22 ⁸ The relevant portion of the COP TR 9-10 is as follows:

23 Court: Okay. Do you understand that the offense that you are pleading
24 Pak: Yes.
25 Court: Now, the maximum punishment for your offense-- I need to inform
26 you of this, it doesn't mean you're going to get it -- is life
27 imprisonment, with a mandatory minimum term of ten years
28 imprisonment, and four million dollar fine. And also a term of
supervised release of at least five years.

(Pause)

Court: Okay. Do you understand?
Pak: Yes.

1 sufficiently discussed the case with his attorney, including the potential applicability of the
2 Sentencing Guidelines, and was satisfied with Mr. Hartsocks's representation.⁹

3 "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v.*
4 *Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629 (1977). Accordingly, a habeas petitioner faces a
5 heavy burden in collaterally attacking a guilty plea based on allegations contrary to oral
6 responses given in open court during a Rule 11 colloquy. *Id.* The court here followed the Rule
7 11 procedures by extensively questioning Pak about the voluntariness of his plea. In fact when
8 the court advised Pak of his right to plead not guilty and proceed to trial, Pak on his own
9 responded "I have no thought of pleading not guilty right now." COP TR 11.

10 Moreover, even if Pak's allegations are true, his proffered evidence fails to demonstrate
11 ineffective assistance or that his plea was involuntary. Pak has provided no credible explanation
12 for what he now contends were perjured statements to the court. He is bound by those statements
13 and has not shown extraordinary circumstances that indicate his answers under oath were not true
14 and his plea was coerced.

15
16 Court: Ok. Now if you're out on supervised release and you violate a
17 Pak: condition, the conditions of your supervised released, you may be
18 Yes. returned to jail for up to five years. Do you understand?

19 ⁹ The relevant portion of the COP TR 10-11 is as follows:

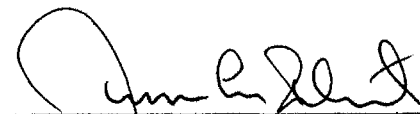
20 Court: Now, have you and your lawyer talked about how the Sentencing
21 Pak: Guidelines might apply to your case?
22 Court: Yes.
23 Court: Do you understand that the Court will not be able to determine the
24 guideline sentence for your case until after a presentence report has
25 Pak: been completed?
26 Court: Yes.
27 Pak: And you and the government have had an opportunity to challenge
28 Court: the reported facts and the application of the guidelines
recommended by the probation officer?
Pak: Yes.
Court: And that the sentence imposed may be different from any estimate
your attorney may have given you?
Pak: Yes.
Court: And that after you – do you also understand that after your
guideline range has been determined, the Court has the authority
in some circumstances to depart from the guidelines and impose a
sentence that is more severe or less severe than that called for by
the guidelines?
Pak: Yes.

1 Any erroneous information counsel gave Pak regarding the minimum sentence was
2 corrected by the court informing Pak of the minimum sentence of 10 years and maximum of life.
3 After being advised of the statutory maximum and minimum sentences. Pak did not seek to
4 withdraw his plea. Moreover, the record made by Pak's counsel at his sentencing suggests that
5 his counsel never advised him that he would be sentenced to no more than 7 years.¹⁰ In light of
6 the record, an evidentiary hearing is not warranted as Pak's claims are palpably incredible and
7 fail to state a claim for relief. *See United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir.2003)
8 (noting that an evidentiary hearing is not warranted if the allegations, "when viewed against the
9 record, do not state a claim for relief or are so palpably incredible or patently frivolous as to
10 warrant summary dismissal") (citation omitted). The court finds Pak's plea was made
11 knowingly, intelligently, voluntarily, free of any threats or coercion. Accordingly, Pak's claim
12 of ineffective assistance of trial and appellate counsel in this regard is without merit.

13 CONCLUSION

14 After conducting a complete review of the record, the court does not find that counsel at
15 trial, sentencing or on appeal were ineffective for failing to raise the non-meritorious issues
16 addressed by Pak in the instant petition. Accordingly, Pak's motion for relief pursuant to 28
17 U.S.C. § 2255 is DENIED.

18 **IT IS SO ORDERED** this 16th day of March, 2006.

19 
20 _____
21 **JAMES L. ROBERT**
22 **United States District Judge**

23 ¹⁰ The record in this regard is as follows:

24 Hartsock: We would urge the court to depart down to a level of a mandatory
25 minimum sentence at the least, primarily because as I have talked
26 to my client since about a year ago, I have told him not to expect
27 a departure that was going to go any further than what we've
discussed with me a year ago, which was 48 months, because of
the quantity of drugs that was involved, because of the fact that he
hadn't been able to successfully initiate contact with his friend in
the Philippines. So we're asking the court to depart down to I
believe it's a level 33 which is 121 months.
28 Court: 32.
Hartsock: Is that 32?
Court: Yes.
Hartsock: Okay, 121 months, which is essentially a ten-year sentence.

* The Honorable James L. Robart, United States District Judge for Western Washington, by designation.